



EUROPEAN COMMISSION

Brussels, 28.5.2021
C(2021) 3999 final

PUBLIC VERSION

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**Subject: State Aid SA.62784 (2021/N) – Germany
COVID-19 Federal Damage Compensation Scheme under Article
107(2)(b) TFEU**

Excellency,

1. PROCEDURE

- (1) Following pre-notification contacts¹, by electronic notification of 21 May 2021, the German authorities notified a scheme for damage compensation in the context of the COVID-19 pandemic (“Regelung zur vorübergehenden Gewährung einer Wirtschaftshilfe zugunsten von Unternehmen, deren Betrieb aufgrund der zur Bewältigung der Pandemie erforderlichen Maßnahmen des Bundes und der Länder geschlossen wird, im Geltungsbereich der Bundesrepublik Deutschland im Zusammenhang mit dem Ausbruch von COVID-19” hereinafter „Allgemeine Bundesregelung Schadensausgleich, COVID-19“ or “BRS”) (“the measure”), in compliance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU).
- (2) Germany exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,² and to have this Decision adopted and notified in English.

¹ By electronic mail of 9 April 2021, the German authorities pre-notified the measure.

² Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

Seiner Exzellenz Herrn Heiko Maas
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

2. DESCRIPTION OF THE MEASURE

- (3) The first case of a COVID-19 infection in Germany was registered on 27 January 2020 in the *Land* of Bavaria.³ Since then, the number of infections has risen to reach a total of 3,473,503, with 84,126 deceased as of 6 May 2021. In response to the outbreak, Germany⁴ introduced inter alia two lockdown decisions in March and November 2020, ordering the closure of certain business activities in significant parts of the economy and cultural life.⁵ The two lockdown decisions ordered closure of certain business activities of a large part of Germany's economic and cultural life from March until May 2020 and from November 2020 until May 2021. Some activities were still completely banned after the first lockdown period ended in May 2020 due to the restrictions imposed as a result of the COVID-19 outbreak.⁶ Those full prohibitions of specific activities in the period after May 2020 are ongoing restrictions of the first lockdown decision and therefore are also covered by the measure. This Decision refers to both lockdown decisions together with the individual lockdown ordinances by the *Länder* collectively as "the lockdown decisions". Further lockdown decisions to be adopted in 2021 due to the ongoing COVID-19 pandemic are also covered by the measure. Such further lockdown measures will only trigger the possibility of obtaining compensation under the measure where they meet the characteristics described in recitals (18) to (21).
- (4) According to the German authorities, Germany's economic performance fell sharply in 2020 due to the COVID-19 outbreak. The latest report of the Federal Statistic Office for the German government from 30 April 2021 shows that gross domestic product (GDP) declined by 4.8% in 2020.⁷ For 2021, the latest projection of the German government, published in April 2021, expected economic output to grow by 3.5%. The current forecast range of economic research institutes projects an increase by 3.0% to 4.9% for 2021. The second lockdown is expected to worsen the country's economic performance, causing even greater damage. The expected damage for beneficiary undertakings is to be countered by the notified measure.

³ <https://www.tagesschau.de/inland/coronavirus-deutschland-erster-fall-101.html>, last downloaded on 9 July 2020.

⁴ "Germany" or "the German authorities" refers to the federal government. The so-called lockdown decision are orders of the *Länder* based on the resolutions of the Federal Chancellor with the heads of government of the federal states to combat the COVID-19 pandemic (see § 1 (b) BRS). The measure will be applied by the *Länder*.

⁵ The first lockdown decision by the federal government together with the heads of the government of the *Länder* were taken on 16 March 2020 and extended on 22 March 2020 and prolonged on 15 April 2020 and 30 April 2020 and lifted by their decision on 6 May 2020. The second lockdown decision was taken on 28 October 2020 and was prolonged on 25 November, 2 December 2020 (expanding the sectors concerned on 13 December 2020), 5 January 2021, 19 January, 10 February, 3 March 2021 and 22 March 2021 until 24 April 2021. On 24 April 2021 a nationwide measure was put into force, so-called "emergency break", with generally applicable closing and opening rules for undertakings depending on local and/or regional incidence values. The duration of the lockdown and the affected activities may vary between the individual ordinances taken by the *Länder* due to the regional infection rate and the necessary regional circumstances. The German authorities committed that the implementing regulation of that framework law will be referring to and be coherent with the duration of the regional lockdown measures.

⁶ Those ongoing prohibited activities includes discotheques, clubs and similar activities.

⁷ According to the Federal Statistical Office (Destatis) report dated 30 April 2021.

- (5) In the light of the above, the German authorities established the notified measure for damage compensation of economic activities that have been subject to the lockdown decisions.

2.1. Legal basis

- (6) The legal basis for the measure is § 53 *Bundeshaushaltsordnung* together with the draft *Allgemeine Bundesregelung Schadensausgleich, COVID-19*.

2.2. Objective of the measure

- (7) The objective of the measure is to compensate the loss of profits from those severable activities of undertakings prohibited by lockdown decisions due to the COVID-19 pandemic. The notion of a prohibition extends in this context to cover activities *de facto* prohibited as the undertakings achieve at least 80 % of their turnover with undertakings whose activities are prohibited by those decisions. The measure further covers the activities of travel operators and travel agencies, which lost at least 80 % of their turnover regarding leisure travellers, who are prohibited to travel to specific destinations on the basis of travel restrictions⁸ or travel warnings issued by the Ministry of Foreign Affairs due to the COVID-19 pandemic.
- (8) The Ministry of Foreign Affairs issued travel warnings on 16 March 2020 as regards non-essential travel to all countries due to the extensive spread of the COVID-19 virus. While Germany maintained the worldwide travel warning against travel to countries outside EEA, Switzerland and the United Kingdom until 30 September 2020, it lifted those general travel warnings for countries in the EEA, Switzerland and the United Kingdom area as of 30 June 2020. With the lifting of the general travel warnings, the Ministry of Foreign Affairs applies a differentiated system for all destinations with the possibility to adjust the list of applicable travel warnings at short notice according to the prevalence of the virus in the regions concerned.⁹ The travel warnings from the German Ministry of Foreign Affairs are the sharpest measure available to the German government if it seeks to limit travel, as an outright travel ban cannot be issued by the State under the German constitutional order. The consequences of travel warnings are very concrete: for the customers, a lack of travel insurance and no systematic assistance in the countries where such a travel warning not to travel applies, and for travel sector operators an obligation to reimburse the costs of the entire booking to customers cancelling their booking, without a cancellation fee.
- (9) The German authorities argue that the lockdown decisions directly caused a damage to the undertakings subject to them (as defined in recital (20)).

⁸ Travel restrictions within Germany can only be issued by the *Länder* and regions in Germany. Those travel restrictions include bans on leisure accommodation, bans on coach travel and entry bans for leisure travellers to certain regions in Germany.

⁹ A travel warning currently applies to over 150 destinations in the EU and worldwide (as of 14 May 2021).

2.3. Budget and duration of the measure

- (10) The German authorities roughly estimate the measure's budget in 2021 at approximately EUR 10 billion and highlight that this amount is only provisional and subject to final decisions in that regard.
- (11) The measure enters into force on the day of the notification of its approval by the Commission and no aid can be granted before that date. Undertakings can apply for compensation under the measure until 31 December 2021. They can apply for compensation of damage incurred in the period affected by the lockdown decisions in place from 16 March 2020 until 31 December 2021.¹⁰ Only the damage resulting directly from the lockdown decisions (as defined in recital (20)) can be compensated and a rigorous and precise quantification of such damage must take place.

2.4. Geographical scope

- (12) The measure applies in the whole territory of Germany.

2.5. Form of aid

- (13) The aid will take the form of direct grants.

2.6. Administration of the measure

- (14) The measure will be managed by granting authorities at different administrative levels (federal, regional or municipal level), depending on the respective rules of each *Land*.

2.7. Beneficiaries

- (15) The beneficiaries of the measure are all undertakings, independent of their size, including non-profit organizations as well as self-employed and self-employed members of the liberal professions in their main occupation. Financial institutions and public owned companies are excluded as eligible final beneficiaries.¹¹
- (16) Aid may not be granted under the framework scheme to medium¹² and large enterprises that were already in difficulty within the meaning of the General Block

¹⁰ The period of prohibition of individual activities can vary due to the different lockdown decisions of the *Länder* based on the resolution taken by the German government together with the heads of the governments of the *Länder*. A compensation for damages is only possible as long as the activity could not be carried out for legal reasons based on the ordinance of the *Land*. If the activity has not been carried out due to economic reasons or due to reasons others than the lockdown decision, compensation is excluded.

¹¹ The BRS sets out in its preamble an indicative list of beneficiaries, listing the type of companies that were targeted by the restriction (in particular shops, but for example not supermarkets; it also lists travel agencies and tour operators and clarifies in Article 2(1) that the *de facto* rules for the traveling sector are limited to those two types of companies, indicating that travel infrastructure is not covered).

¹² As defined in Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

Exemption Regulation (“GBER”)¹³ on 31 December 2019. Aid may be granted to micro and small enterprises that were in difficulty within the meaning of the GBER on 31 December 2019, if those enterprises, at the moment of granting the aid, are not subject to collective insolvency procedure under national law and they have not received rescue aid¹⁴ or restructuring aid.¹⁵

- (17) Undertakings which are part of a multinational group of undertakings for the purposes of § 90 (3) sentence 4 *Abgabenordnung* (Fiscal Code) are obliged to disclose information on the actual ownership structure of all parts of the group to the granting authority. If they are obliged to prepare a country-by-country report under § 138a (1) *Abgabenordnung*, they must submit that report to the granting authority. Undertakings which are part of a multinational group of undertakings for the purposes of § 90 (3) sentence 4 *Abgabenordnung*, are also obliged to confirm that the aid granted by the granting authority does not go to non-cooperative jurisdictions within the meaning of the EU list of non-cooperative jurisdictions for tax purposes.¹⁶ Undertakings which are domiciled in non-cooperative jurisdictions cannot be recipients of aid under the measure.

2.8. Basic elements of the measure

- (18) The measure is intended to contribute to compensate damage directly caused by the lockdown decisions due to the COVID-19 outbreak precluding the beneficiary, *de jure* or *de facto*, from operating its full economic activity or a specific and severable part of its activity.
- (19) The lockdown decisions are based on a resolution of the German chancellor and orders of the individual federal states (*Länder*) and resulted in a closure of certain activities. This implies that the undertaking concerned does not have any margin of discretion to maintain the activity covered by the respective executive or legislative act.
- (20) Pursuant to Article 2(1) BRS, the activities eligible for compensation are those activities exercised by a domestic permanent establishment or a domestic headquarters of the management and are registered with a German tax office for tax purposes: The activities must either be
- (a) Activities explicitly prohibited by the lockdown decisions (they can concern the entire business or a targeted activity¹⁷), or

¹³ As defined in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

¹⁴ Alternatively, if they have received rescue aid, they have reimbursed the loan or terminated the guarantee at the moment of granting of the aid under the notified measure.

¹⁵ Alternatively, if they have received restructuring aid, they are no longer subject to a restructuring plan at the moment of granting of the aid under the notified measure.

¹⁶ The EU list of non-cooperative jurisdictions for tax purposes — Report by the Code of Conduct Group (Business taxation) suggesting amendments to the Annexes of the Council conclusions of 5 December 2017, including the de-listing of one jurisdiction; OJ C 403, 9.11.2018, p. 4.

¹⁷ The exclusion of certain highly material and clearly defined categories of clients due to the lockdown decisions creates a direct link between the exceptional occurrence and damage resulting from the exclusion of those clearly defined client categories. Among other things, the exclusion of highly

- (b) Activities of undertakings which achieve at least 80 % of their turnover with undertakings whose activities are prohibited by the lockdown decisions as described in point (a),¹⁸ or
 - (c) Activities of travel agencies or tour operators which lost at least 80 % of their turnover regarding leisure travellers who are prohibited to travel to specific destinations due to travel warnings¹⁹ issued by the Ministry of Foreign Affairs in the context of the COVID-19 pandemic or travel restrictions²⁰ in other countries which applies to leisure travellers from Germany or within Germany on the basis of explicit travel restrictions contained in the lockdown decisions. Germany argues that those travel restrictions and travel warnings (see recital (8)) resulted in a total stalemate from 16 March to 30 June 2020, whereas Germany accepts that after that point in time those measures were limited to certain destinations. Therefore, for the period after 30 June 2020, the loss of turnover would be determined on a (restricted) destination-by-destination basis.
- (21) Pursuant to Article 2(2) BRS, if an undertaking pursues various activities (mixed business)²¹ of which some activities are not at all concerned by the lockdown, the undertaking remains eligible to the extent the prohibited activity constitutes at least 80% of the turnover of the undertaking.
- (22) Pursuant to Article 3(1) BRS, the measure covers only damage suffered in respect of the prohibited activity or a specific and severable part of activity directly resulting from the different lockdown decisions in the period covered by that measure. The damage is the negative difference between the operating profit²² of the prohibited activity determined during the periods affected by the different lockdown decisions taken and the operating profit obtained in the corresponding periods of 2019 (“eligible damage”).
- (23) If the effect of a lockdown decisions relates to a targeted activity or a specific and severable part of activity and the income is therefore shifted to another related activity or source of income of the undertaking, the operating profit of that other related or linked activity is to be identified and taken into account of the calculation of the eligible damage restrictively.²³ Therefore, it should be avoided that an advantage can be obtained from the fact that only targeted activities subject

material category of clients includes the ‘click & collect’ measure applied in the retail sector, whereby the shop is in principle closed but the purchased goods could be collected at the shop.

¹⁸ Germany refers to a laundry specialised in dealing with hotels.

¹⁹ For the concrete consequences of travel warning see recital (8).

²⁰ Those restrictions could be entry bans for German leisure travelers issued by other countries.

²¹ Germany refers to business exercising entirely different activities, where the main activity is concerned by the lockdown, which is however different from a targeted activity.

²² Operating profit is the sum of net sales, net inventory changes, own work capitalized and other operating income less cost of materials, personnel expenses, depreciation and amortization and other operating expenses. In turn, in accordance with §1(1) of the German Value Added Tax Act (Umsatzsteuergesetz), the underlying sales essentially correspond to the deliveries and services performed by an entrepreneur for its business in Germany. A turnover has been achieved in a given month if the service was rendered in that month.

²³ See example in footnote 17. Germany commits that in such a case beneficiaries will either need to have an account separation between the activity affected by the lockdown decisions and the remaining activities that are not affected by the lockdown decisions or where this is not possible the revenue shares of the activities from 2019 are used to allocate fixed costs.

to the lockdown decisions are considered, and the activity is shifted or the capacity is used for other related activities, which have become more profitable as a result of that shift. The damage compensation is capped to the activity prohibited by the lockdown decisions and the activity seen in its entirety cannot be more profitable than the entire operating profit of those activities of the respective period in 2019. Losses suffered by activities not prohibited by the lockdown decisions and not related or linked to the prohibited activity are excluded from the eligible damage calculation, so as to exclude overcompensation for the damage suffered.

- (24) To limit the aid to the minimum necessary, the beneficiaries have an obligation to take all reasonable measures to minimise the damage that they incur. Any expenses that have been avoided or savings that have been made or any benefits received on any other basis should therefore be deducted from the eligible damage. They should include, among others, in particular saved personnel expenses (e.g. by means of short-time allowances) and costs not incurred (e.g. for IT or infrastructure).
- (25) In addition, the German authorities confirmed that:
- Payment made to beneficiaries will be net of any amount obtained from insurance, litigation, arbitration or any other source for the same damage.
 - The damage calculation for the period between 1 July 2020 and 31 December 2021 will be rigorous taking into account the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures, all of which cannot be taken into account in the calculation of the eligible damage. Germany commits to apply price adjusted gross domestic product (GDP) year-to-year decline, which is 5 % according to calculations of the Federal Statistical Office (Destatis) (see also recital (4)), to determine the counterfactual profits for the periods between 1 July 2020 and 31 December 2021, which accordingly reduces the potential damage. In order to adjust for sector specificities of the measure, the haircut that is applied to counterfactual profits may need to be increased, if appropriate.
 - If the monthly damage compensation per beneficiary exceeds, on average over the eligible compensation period, EUR 4 million²⁴, the counterfactual profits must be determined on a case-by-case basis. In that analysis for each beneficiary concerned, the individual counterfactual profits have to be adjusted for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures. In particular, the actual impact of the restrictions will be established by comparison with periods in 2020 and 2021 where such eligible restrictions were not enforced. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of 20 % on the entire corresponding profits of 2019 will be applied.

²⁴ In order to determine whether the ceiling of EUR 4 million is exceeded Germany should calculate the damage compensation without applying the deduction of the 5 % GDP decline to the counterfactual profit.

- The benefit of the aid is excluded for any applicant who is responsible for the damage suffered and/or did not conduct its activities with due diligence or in compliance with applicable legislation or did not take any measure within its responsibility to mitigate its damage.
- (26) The aid is granted based on forecasted damage on the basis of unaudited consecutive monthly financial reports, in line with the accounting rules of the HGB and the tax law, if the audited accounts or the final tax accounts demonstrating the actual damage are not available at the time of the application. Compliance with the restrictions in recital (25) must be observed.
- (27) The final amount of aid will be determined *ex post* after realisation of the damage resulting directly from the lockdown decisions. Upon finalisation of the audited accounts, the applicant's tax advisers, lawyers or chartered accountants must present the appropriate evidence to the competent authorities indicating whether the actual damage is equal or higher than the amount of aid. If the actual damage is not equal or higher than the aid, the applicant has to reimburse on its own initiative the respective difference *ex post*. The calculation of the damage is based on the reference period in 2019, taking into account economic effects of declines in demand due to lower aggregate demand. The final proof of the actual damage will be verified and approved *ex post* by the competent authority on basis of audited accounts or another determination of profits in line with the accounting rules of the HGB or the tax laws. Where a beneficiary has received compensation in excess of the amount determined by the authority managing the administration, the authority will require the beneficiary concerned to repay any overcompensation received.

2.9. Cumulation

- (28) According to Germany, aid granted under the measure may be combined with other aid for the compensation of eligible damage, and with aid under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended ("the Temporary Framework")²⁵, up to a limit of 100 % of the eligible damage as calculated for the purposes of the measure.²⁶
- (29) In case of a cumulation with aid under section 3.12 of the Temporary Framework, the beneficiary may repay the section 3.12 aid before applying for aid under the measure.
- (30) The granting authority must impose an obligation on the beneficiaries of any aid under the measure to provide details of all aid applied for or received in connection

²⁵ Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1) and C(2021) 564 (OJ C 34, 1.2.2021, p. 6).

²⁶ This also includes aid already approved by the Commission on the basis of the Temporary Framework under the "Third Amended Federal Scheme on Small Grants 2020", the "Federal Scheme on subsidised Loans 2020", the "Federal Scheme on Guarantees 2020", the "Federal Scheme on Uncovered Fixed Costs 2020", the "Federal Scheme on recapitalisation measures and subordinated loans 2020" and aid approved on the basis of Article 107 (2)(b) TFEU under the "Federal scheme for damage compensation for the November and December 2020 lockdown" as in force at the time of this decision.

with the COVID-19 outbreak in the EEA. It must advise the beneficiary that that information constitutes “facts relevant to subsidies” as set out at § 264 of the Criminal Code (*Strafgesetzbuch*) and that subsidy fraud is punishable under that provision.

2.10. Monitoring and reporting

- (31) The German authorities committed to provide a report no later than one year after the date of the Commission decision, as well as a list of all individual aid measures based on the scheme no later than one year after the Commission decision. That list will include the amount of compensation and recoverable advances granted as well as recoveries.

3. ASSESSMENT

3.1. Lawfulness of the measure

- (32) The German authorities have fulfilled their obligation according to Article 108(3) TFEU by notifying the aid measure before putting it into effect. The Commission takes note of the fact that the scheme will enter into force only after the notification of the approval by the Commission.

3.2. Existence of State aid

- (33) Article 107(1) TFEU defines State aid as “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States*”.
- (34) The qualification of a measure as aid within the meaning of that provision therefore requires that the following cumulative conditions be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.
- (35) The measure is imputable to the State as it is based on the acts mentioned in recital (6) and it is taken by the State authorities. The compensation envisaged by Germany will be paid from the State budget (recital (10)) and is therefore provided through State resources within the meaning of Article 107(1) TFEU.
- (36) The measure confers an advantage on its beneficiaries in the form of direct grants (recital (13)). The measure thus relieves those beneficiaries of damage that they would have to bear under normal market conditions. The advantage corresponds to the amount of compensation paid under the scheme.
- (37) The advantage granted by the measure is selective, since it is awarded only to certain undertakings, excluding the financial sector (see recitals (15)-(17)).
- (38) The measure is liable to distort competition, since it strengthens the competitive position of its beneficiaries. As the scheme covers sectors and undertakings involved in trade between Member States (see recital (12)), there is a risk that the aid could distort or threaten to distort competition and affect such trade.

- (39) The proposed measure therefore constitutes State aid within the meaning of Article 107(1) TFEU.

3.3. Compatibility

- (40) The Commission has examined the notified scheme pursuant to Article 107(2)(b) TFEU.

The notion of exceptional occurrences with the meaning of Article 107(2)(b) TFEU

- (41) Article 107(2)(b) TFEU provides that aid to make good damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. Neither the TFEU nor other Union legislation contains a precise definition of the notion of exceptional occurrence. As they constitute exceptions to the general prohibition of State aid within the internal market laid down in Article 107(1) TFEU, the Commission, in line with the consolidated Union case-law²⁷ has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively.
- (42) The characterisation of an event as being an exceptional occurrence is made by the Commission on a case-by-case basis, having regard to its previous practice in the field²⁸.
- (43) In that regard, the following indicators relating to the event concerned must be cumulatively met: (i) unforeseeable or difficult to foresee²⁹; (ii) significant scale/economic impact³⁰, and (iii) extraordinary³¹.

COVID-19 outbreak as an exceptional occurrence

- (44) Following the first reports of cases of acute respiratory syndrome (COVID-19) in the Chinese Wuhan municipality at the end of December 2019, the Chinese

²⁷ Judgment of the Court of Justice of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and judgment of the Court of Justice of 23 February 2006, *Atzeni and others*, in Joined Cases C-346/03 and C-529/03, EU:C:2006:130 paragraph 79.

²⁸ Exceptional occurrences which have been accepted in the past by the Commission include war, internal disturbances and strikes, and, with certain reservations and depending on their extent, major industrial accidents which result in widespread economic loss, see Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, paragraph 330 (OJ C 204, 1.07.2014, p. 53).

²⁹ Commission Decision of 1 August 2008, case SA.32163, Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010, Slovenia, recital 31.

³⁰ Elements taken into account by the Commission to consider that the occurrence reached a significant scale: negative consequences cannot be contained (Commission Decision of 4 October 2000 on case NN 62/2000, Régime temporaire d'aides aux entreprises victimes des intempéries et de la marée noire – France), or because of the number of dead or injured people (Commission Decision of 11 April 2012 on case SA.33487, Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident"), Hungary, recital 35; Commission Decision of 2 May 2002 on case N241/2002, Régime en faveur des entreprises victimes de la catastrophe industrielle de Toulouse, France, recital 19), the immense ecological and economic damage (Commission Decision of 11 April 2012 on case SA.33487, recital 36), the amount of material damage despite the local character of the industrial accident (Commission Decision of 2 May 2002 on case N 241/2002, recital 19).

³¹ In its Decision of 19 May 2004 in case C-59/2001 (OJ L 62, 2007, p. 14), the Commission considered that the (alleged) fall in sales of poultry meat in a Member State not directly affected by the dioxin contamination, did not constitute in itself an exceptional occurrence. It was yet an unforeseeable event, but formed part of the normal commercial risks to which an undertaking is exposed.

authorities identified a novel coronavirus (SARS-CoV-2) as the main causative agent, which had not been previously identified in humans. Outbreaks of novel virus infections among people are always of public health concern and can have a significant economic impact. Specific sectors and areas are particularly affected by the outbreak and by governmental restrictions and recommendations, be it directly or indirectly.

- (45) The declaration of the World Health Organization of a pandemic associated with the public health risk deriving from the absence of therapeutics or vaccines for COVID-19 at the time and the continued shortage of such treatments determine the exceptional nature of the circumstances. The rapidity of the spread can cause enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption. The necessity to adopt and encourage the respect of measures aimed at interrupting transmission chains stems from that acknowledgement. Such measures can result in far-reaching disruption of various economic sectors, which is clearly outside the normal functioning of the market.
- (46) In view of the above, this event qualifies as an exceptional occurrence because: (i) it was not foreseeable; (ii) it is clearly distinguishable from ordinary events by its character and effects on both the undertakings directly affected and the economy as a whole; and (iii) it lies outside of the normal functioning of the market.³²
- (47) In that context, the COVID-19 outbreak can be considered as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

Causal link between COVID-19 outbreak and damage compensated by the measure

- (48) As an immediate consequence of the COVID-19 outbreak in Germany, the German authorities adopted several lockdown decisions.
- (49) Under the lockdown decisions, most economic activities have been prohibited in all *Länder* for the lockdown periods due to the COVID-19 outbreak. Those measures are a reaction to the exceptional occurrence and result in a loss of profit incurred in the periods covered by the lockdown decisions.
- (50) In order to implement the measure, the implementation measures will stipulate that the only activities eligible for compensation are those for which the prohibition of activities imposed by the lockdown decisions preclude the beneficiary, either *de jure* or *de facto*, from operating its economic activity or a specific and severable part of its activity.
- (51) First, that notion of a prohibition of activities includes measures which explicitly require the cessation of:
- (a) Activities where the measures result in the complete cessation of an economic activity, which may thus not be exercised at all. This is so independently of whether the beneficiary continues to operate activities not prohibited by the lockdown decisions.

³² See judgment of 17 February 2021, *Ryanair v Commission*, T-259/20, EU:T:2021:92, paragraph 26.

- (b) Certain areas of the activities, which are severable parts of business activities, the revenues of which can be separated from those of the activities not curtailed. Such prohibitions may, for example, concern certain highly material categories of clients (tourist vs business clients). In that sense it is also ensured that an undertaking may not divert its prohibited activities to other activities without such a diversion being considered in the damage compensation (see recital (23)).
- (52) Second, that notion of a prohibition of activities includes measures precluding the beneficiary *de facto* from operating its economic activity, because the cessation of an activity is the direct consequence of a prohibited activity. In that situation, it will be for the beneficiary to show it faces a prohibition of its activities, based on evidence of a direct dependency between the activities concerned by showing that 80% of the turnover of the supporting activity *de facto* affected stem from undertakings carrying out prohibited activities within the scenarios set out in recital (53) (see recital (20)(b)).
- (53) However, in case of business with mixed activities, there is a direct link between the closed activity and the damage only if the undertaking makes at least 80 % of its turnover from the prohibited activity (see recital (21)).
- (54) Third, that notion of a prohibition of activities includes measures precluding the beneficiary *de facto* from operating its economic activity in the travel sector, because of the cessation of leisure travel activities as the direct consequence of the travel restrictions contained in the lockdown decisions and/or the travel warnings issued by the Ministry of Foreign Affairs due to the ongoing COVID-19 pandemic (see recital (20)(c)). The direct dependency between the activities concerned must be demonstrated by showing that 80 % of the turnover of the travel activity *de facto* affected stem from leisure travellers being prohibited from travelling to certain destinations due to travel restrictions or travel warnings.
- (55) The period for damage is limited to the prohibition periods of the activities banned due to COVID-19 outbreak imposed by the lockdown decisions and the ordinances of the *Länder* for which a beneficiary can prove a direct causal link in regard to its own situation (see recital (20),(21) and (22)). Further lockdown decisions to be adopted in 2021 due to the ongoing COVID-19 pandemic are also covered by this measure (recital (3)). Such further lockdown measures will only trigger the possibility of obtaining compensation under the measure where they meet the characteristics described in recitals (50) to (54).
- (56) The notion of a prohibition of activity does not cover any situations other than those described in recitals (51) to (55).
- (57) Therefore, the lockdown decisions and the consequent prohibition of activities by the German authorities are sufficient to provide a direct link between the COVID-19 pandemic and the damage suffered.

Proportionality of the aid measure

- (58) In order to be compatible with Article 107(2)(b) TFEU, the aid must be proportional to the damage caused by the exceptional occurrence. Aid must not result in overcompensation of damage; it should only make good the damage caused by the exceptional occurrence.

- (59) Germany put in place an objective, evidence-based, system as to the damage calculation. Beneficiaries will be required to provide all necessary documentation in that regard and evidence of the damage actually incurred must be submitted to the granting authority in writing. The competent authorities will check in each case that those elements correctly reflect the direct consequences of the COVID-19 outbreak directly caused by restrictive measures precluding the beneficiary from operating its economic activity.
- (60) The measure ensures that the aid is limited to the minimum necessary and avoids overcompensation. As explained in recitals (24) and (25), beneficiaries have an obligation to take all reasonable measures to minimise the profit losses that they incur and to deduct from the damage any expenses that have been avoided or savings that have been made or any benefits received on any other basis.
- (61) A rigorous damage calculation of the measure is further ensured. The economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures, will be taken into account by adjusting for a drop of the GDP year-to-year decline in Germany, which is 5% (see also recital (4)), when determining the counterfactual profit. In order to adjust for sector specificities of the measure, the haircut that is applied to counterfactual profits may need to be increased, if appropriate. In addition, if the monthly damage compensation per individual beneficiary exceeds, on average over the eligible period, EUR 4 million, the counterfactual profits must be determined on a case-by-case basis. In that analysis for each beneficiary concerned, the individual counterfactual profits have to be adjusted for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures. In particular, the actual impact of the restrictions will be established by comparison with periods in 2020 and 2021 where such eligible restrictions were not enforced. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of 20 % on the entire corresponding profits of 2019 will be applied.
- (62) As explained in recital (22), to avoid overcompensation, a profit loss caused by an activity not prohibited by the lockdown decisions of the German authorities is not eligible for aid. In addition, profits shifted from a prohibited activity to activities not covered by the lockdown decisions reduce the possible amount of damage (see recital (51) (b)).
- (63) *Ex post* control of overcompensation will be based, *inter alia*, on the audited accounts or the tax accounts of the beneficiaries.
- (64) The granting authority has an obligation to recover any overcompensation from the aid recipient (see recital (27)). The “claw-back mechanism” requires the recovery of payments in excess of the actual damage resulting directly from the lockdown decision. The authority managing the administration of the measure will carry out an *ex post*-assessment and evaluate the exact damage suffered. The authority managing the administration of the measure will evaluate whether the estimated damage was higher than the one actually incurred and recover accordingly, if need be (recital (27)).

- (65) In addition, the German authorities have put in place the following safeguards, so that the compensation under the notified measure does not exceed what is necessary to make good the damage:
- Any payment made to beneficiaries is net of any amount recovered by insurance, litigation, arbitration or other source of compensation for the same damage, in addition to which the economic effects of declines in demand when computing the damage must be taken into account (recital (25));
 - In addition, there is an exclusion of any applicant responsible for the damage suffered, or that did not conduct its activities with due diligence or in compliance with applicable legislation, or that did not take any measure to mitigate its damage (recital (25)).
- (66) In light of those safeguards, the Commission considers that the compensation under the measure will not exceed the damage directly suffered by each beneficiary from the COVID-19 outbreak as a result of the related measures taken by the public authorities.
- (67) In view of the above, the Commission considers that the notified aid scheme is compatible with the internal market in accordance with Article 107(2)(b) TFEU.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(2)(b) of the Treaty on the Functioning of the European Union.

The decision is based on non-confidential information and is therefore published in full on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President